Business Standard

New Takeover Code will keep raiders away

N Sundaresha Subramanian / Mumbai September 30, 2011, 0:39 IST

Definition of voluntary offers rules out hostile bids, say corporate lawyers.

In 2006, US outsourcing major EDS made a voluntary open offer to buy 52 per cent of Jerry-Rao promoted Mphasis. EDS completed the Rs 1,750 crore deal by buying 83 million shares, even though it did not have any prior shareholding in Mphasis.

Such voluntary offers by outsiders will not be possible under the new Takeover Code, which takes effect next month, say M&A lawyers.

The Sebi (Substantial Acquisition of Shares and Takeover) Regulations 2011 has made attempts by outsiders difficult and time-consuming by providing specific terms for "voluntary open offer".

"An acquirer, who together with persons acting in concert with him, holds shares or voting rights in a target company entitling them to exercise 25 per cent or more but less than the maximum permissible non-public shareholding, shall be entitled to voluntarily make a public announcement of an open offer for acquiring shares in accordance with these regulations," the new code says.

This provision, while arming the promoters with a provision to consolidate holdings, puts in place time and shareholding restrictions on such offers, virtually shutting the door on nasty surprises from raiders, experts say. According to the new regulations, only people already holding a minimum of 25 per cent in a target company can make voluntary offers for 10 per cent or more. Even these shareholders cannot make voluntary offers if they had purchased shares from the market in the preceding one year.

Under the 1997 regulations now in force, there is no distinct category as a voluntary open offer. Therefore, nothing prevented any non-promoter, with or without a shareholding, from making an unsolicited open offer to public shareholders. The new criteria put most large companies clear of hostile bids, experts say. Even deals like Mphasis, where promoters willingly tendered their shares, will not be possible, they add. Ruchi Hans of Corporate Professionals, a consulting-cum-merchant banking firm, says, "The prior holding criteria and the limits on market purchases will thwart hostile acquisition attempts and prevent people without substantial stakes from creating pressure on or threatening the promoters."

"Given that the C Achuthan-led Takeover Regulations Advisory Committee did not frown upon or otherwise make recommendations against hostile acquisitions in its report, the manner in which the 2011 Takeover Regulations have been drafted seem to be inadvertent. These omissions will, however, have serious ramifications for corporate India," Amarchand Mangaldas, a leading M&A law firm, said in a note.

HOSTILE ACQUIRERS BEWARE

VOLUNTARY OFFER RULES, 1997	NEW RULES
No separate provision/definition	Distinct provisions under Chapter II
No minimum shareholding norm	Acquirers should hold 25 per cent or more
Open offer size not specified	Offer should be for at least 10 per cent
No cap on post-offer stake	Post-offer stake cannot exceed 75 per cent
Can buy from market before offer	No share purchases in previous 52 weeks
No bar on post-offer deals	Six-month bar on fresh purchases post offer

At least 493 of the top 500 firms listed on the Bombay Stock Exchange would benefit from this ring-fence. According to the Business Standard Research Bureau, only seven of the top 500 listed firms had non-promoter shareholders holding of more than 25 per cent, as of June 30, 2011.

In Hindustan Zinc, the central government still holds close to 30 per cent, after a strategic sale to Sterlite group. Balmer Lawrie, ICICI Bank and ITC Ltd do not have any identifiable promoters, but have large investment firms holding over 25 per cent stake. Redington India, Himadri Chemicals and VST Industries are the other firms with substantial holding by non-promoter entities. In at least 222 of the BSE 500 firms, there are non-promoter shareholders with holdings of 7 per cent or more. In 65 companies, such investors hold at least 10 per cent.

Since the direct offer is ruled out, potential acquirers will have to buy shares through the stock exchange or negotiated deals to first cross the 25 per cent threshold. This will automatically trigger the mandatory open offer for 26 per cent, making deals more expensive, say lawyers.

For example, EIH Ltd is an interesting case, where ITC Ltd and a Reliance group company hold over 14 per cent each. If either of them want to acquire the company, they will now have to take the mandatory open offer route. ITC itself has large holdings by LIC (12.7 per cent) and the Special undertaking of UTI (11.6 per cent). Institutions like LIC (which has significant holdings in 38 of the companies analysed) are financial investors and do not pose a big threat to promoters. However, there is a possibility of these shares being bought in bulk by a potential acquirer. Billionaire investor Rakesh Jhunjhunwalla holds between seven and 17 per cent in five of these companies.

However, according to some lawyers, a second, liberal view is possible. Akila Agrawal, partner, Amarchand Mangaldas, says, “The provisions on voluntary offers are ambiguous. Two views are possible. One view is that voluntary offers with a minimum offer size of 10 per cent can be made only by persons who already hold at least 25 per cent stake. The corollary is there is no prohibition on voluntary offers by persons holding less than 25 per cent so long as the minimum offer size is 26 per cent. The second view is that a voluntary open offer by persons who hold less than 25 per cent (and who have not made a mandatory offer in past) is not permitted at all.”